SUPREME COURT OF THE UNITED STATES.

No. 274.

WILLIAM CLARK, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimant's petition	1	1
Traverse by U. S. solicitor	5	5
Further special plea by deputy solicitor	7	6
Replication to special plea	7	6
Final judgment of the court	8	7
Claimant's petition for the allowance of appeal	9	7
Alterations and modifications of the names, as certified by the court	11	8
Certificate of ch. cl'k Court of Claims	16	10

1 WILLIAM CLARK
vs.
THE UNITED STATES.

The said petitioner, by leave of the court, here files his amended petition herein.

Court of Claims of the United States, sitting in Washington, D. C.

Your petitioner, William Clark, of Memphis, Tennessee, respectfully represents that on the 30th day of June, 1846, he contracted with the United States, through the navy agent at Memphis, for the delivery of materials and the making of 221,000 yards of embankment, upon the terms and conditions stated in the written contract, of which a copy is here inserted, and to which reference is made for the true stipulations thereof.

Contract with William Clark.

This contract, made and entered into this 30th day of June, A. D. 1846, between William Clark, of Memphis, Tennessee, of the one part, and Joseph S. Watkins, navy agent at Memphis, aforesaid, acting under the authority of the Navy Department for and in behalf of the United States, of the other part, witnesseth: That the said William Clark doth hereby contract and engage with the said Joseph S. Watkins as follows: that for the consideration hereinafter mentioned the said William Clark will furnish all the material and make 221,000 cubic yards of embankment at the navy yard, Memphis, Tennessee, or so much as shall be required of him by the engineer or other duly authorized agent; the embankment to be made of clay, sand, gravel, or other good material, in such manner and places as shall be directed by the said engineer or other authorized agent. And the said William Clark doth further engage and contract to finish this embankment on or before the 15th day of July, 1847. And the said William Clark doth further engage and contract that no member of Congress, officer of the navy, nor any person holding any office or appointment under the Navy Department, shall have any interest or be in anywise concerned, either directly or indirectly, in any of the issues, profits, or receipts of this contract. And the said Joseph S. Watkins, acting as aforesaid, doth hereby contract and engage with the said William Clark as follows: That for the materials and embankment made, approved of, and received, and inspected as aforesaid, according to the terms and stipulations of this contract, there shall be paid to the said William Clark, or order, by the navy agent at Memphis, on account of all bills presented for the aforesaid materials and work delivered and executed, made out in approved form, authenticated by the certificate of the inspecting officer or officers, and approved of by the commanding officer of said yard, the following price, viz: eighteen cents for every cubic yard. And it is hereby further stipulated by and between the parties hereto, that the department reserves to itself the right of diminishing or increasing the above-named quantity of embankment; and should the quantity be increased or diminished,

the same price as is specified for the embankment shall be paid to the contractor, and no more. No other charge to be admitted nor
2 allowance to be made by the United States for or on account of this contract, and ten per centum to be withheld from the amount of all payments on account thereof as collateral security, in addition to the bond given to secure its performance, and not in any event to be paid until it is in all respects complied with; and ninety per centum of the amount of all deliveries made will be paid by the said navy agent within thirty days after bills duly authenticated, as aforesaid, shall have been presented to him. In testimony of all which agreements and stipulations, the parties above named have hereunto signed their names and affixed their seals this 30th day of June, A. D. 1846.

WILLIAM CLARK. [L. S.]
JOSEPH S. WATKINS, [L. S.]
Navy Agent.

Signed, sealed, and delivered in presence of—
W. C. ROGERS.
E. L. CONANT.

Your petitioner alleges that he faithfully prosecuted the said work until he had delivered materials sufficient to make at least 220,000 yards of embankment; but such was the ruinous construction placed upon the contract by the officers of the navy yard, so great the embarrassments thrown in his way, and so unfair and unreasonable the mode of measurement adopted, that he was forced to abandon his contract to avoid the ruin in which its continuance would have involved him.

That provision of the contract which stipulates for the payment of ninety per centum "within thirty days after the bills, duly authenticated, shall have been presented," was made in view of the custom universally adopted of paying such bills monthly. The course was pursued in this case; monthly measurements were made, and the bills paid accordingly. But while the petitioner insisted that each month's work should be separately measured, and paid for as so much embankment completed and received, the engineer and officers of the yard insisted upon measuring the whole work at the end of each successive month, deducting the amount previously paid for, thus making the contractor responsible for all the casualties, waste, shrinkage, and washing away by the waters of the river. This mode of estimate was unjust and oppressive in its operation upon the contractor. He maintains that, according to the true intent and meaning of the contract, each month's work was so much embankment completed, and ought to have been measured, received, and paid for as such, and that all waste or shrinkage or caving afterwards was the loss of the government and not of the contractor.

But still further to oppress the contractor, the officers of the government actually occupied the embankment made, and, in their view, still unfinished, for the erection of buildings and for the hauling of heavy materials, the effect of which was to produce an immense re-

duction in the apparent amount of work done, as shown by the testimony of credible witnesses.

In addition to these sources of loss unjustly thrown upon the contractor, it is well established that the foundation on which the embankment was made, being somewhat of the nature of quicksand, ac-
3 tually sunk for some distance before it became solid. But no allowance was made for the additional embankment required from this cause.

Lastly, your petitioner was required to throw the earth, of which his embankment was made, sometimes into the water, and at other times even into the current. This contract required him to act under the direction of the engineer, and he had no alternative but to obey. Yet your petitioner insists now, as he did then, that these orders were improvident and unwise, and could not have been anticipated by the contractor. He believes they were inconsistent with the spirit of the contract, and unjust and oppressive to him, especially as the work might have been done so as to avoid this difficulty.

Your petitioner insists that, upon a fair estimate of the work done by him according to the contract, he was entitled to the sum of $51,936 85; but, according to the measurements and estimates of the department, he was allowed only $23,204 44, which was subsequently increased by other small allowances to the sum of $26,423 34, leaving a balance still due him of more than $25,513 51.

Your petitioner begun the work in July, 1846, and ceased on the 31st of March, 1848, and appealed to the Navy Department for redress. After an investigation there, the decision of the officers of the navy yard were sustained. Your petitioner renewed his application to the department on the 22d March, 1852, with numerous depositions to sustain it, which were equally unsuccessful.

But your petitioner also claims damages for injury sustained by him in losing the fair profits which he would have earned had he been permitted to go on and finish his contract under a proper construction of it. He also claims damages for loss sustained in being compelled to sell his carts, horses, and railway, at a heavy sacrifice, caused by the same injustice of government towards him. He also claims interest from the 20th of April, 1852, when the Secretary of the Navy finally rejected his claim, till paid.

After having in vain applied to the department for redress, your petitioner was compelled to present his claim to Congress. On the 17th of July, 1854, the Naval Committee of the Senate made a favorable report, and on the 9th of February, 1855, the bill for the relief of your petitioner was passed, and sent to the House of Representatives for its concurrence. This bill not having been acted upon at the close of the late session, was referred, with all the papers, to this court for its examination and decision. Your petitioner refers to his papers presented to the Senate for a more minute and particular statement of his claim, and of the proof upon which it rests. He insists that the principle adopted in the said Senate bill, to wit, "that he be allowed the contract price of eighteen cents per cubic yard for all the materials delivered by him," is the true principle involved in

said contract, and he prays that it may be adopted by this court, and that his claim may be adjudged upon this basis.

Your petitioner further states he is the sole owner of the claim aforesaid, except that he has given to John M. McCalla, his counsel herein, an interest of twenty per centum of whatever shall be recovered on said claim.

4 Your petitioner declares that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided or abetted, or given encouragement to, rebellion against the said government.

WILLIAM CLARK.
By JNO. M. McCALLA,
Counsel for Claimant.

I do hereby declare that no assignment or transfer of the above claim of William Clark *vs.* The United States, or any part thereof, except as mentioned in said petition, has been made to any person whatever; that said claimant is justly entitled to the amount claimed therein from the United States, after allowing all just credits and offsets, and that I believe the facts as stated in said petition are true.

JOHN M. McCALLA,
Counsel for Claimant.

[U. S. rev. stamp.]

Sworn and subscribed to before me this 25th day of January, 1864.
BENJ'N S. KINSEY, *J. P.* [SEAL.]

Your petitioner declares that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

WILLIAM CLARK.

Subscribed and sworn to before me November 2d, 1863.
L. R. RICHARDS, *J. P. & C.*

[U. S. rev. stamp.]

MAYOR'S OFFICE, *Memphis, Tennessee.*

To whom it may concern:

I, John Park, as ex officio justice of the peace in and for the county of Shelby and State of Tennessee, and as mayor of the city of Memphis, hereby certify that L. R. Richards, whose signature appears to the foregoing affidavit of William Clark, is an acting justice of the peace for the county aforesaid, duly commissioned and qualified; that his signature is genuine, and that his official acts are entitled to full faith and credit.

I further certify that the bench of our county court is vacated by the death of the judge, who usually certifies to magistrate's acts like the foregoing, and that the clerk of said court, and the judges and

clerks of all State courts of record in this county are absent, so that the regular legal formalities of authentication cannot be had.

In testimony whereof I have hereunto set my hand and affixed the corporate seal of the city of Memphis, this 2d November, 1863.

[SEAL.] JOHN PARK, *Mayor.*

Attest: L. R. RICHARDS, *City Register.*

(U. S. rev. stamp.]

5 In the Court of Claims.—October term, 1864.

WILLIAM CLARK *vs.* THE UNITED STATES. } No. 1,985.

And now come the United States, by Charles Gibson, their solicitor, and say that they are not indebted unto the said claimant in the said sum of $25,513 51, nor any part thereof.

And as to so much of said petition as avers that the claimant has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants say that they are not advised of the truth of said allegations, and therefore deny the same.

CHARLES GIBSON,
Solicitor for United States.

Filed March 14, 1864.

6 In the Court of Claims.—October term, 1864.

Plea.

THE UNITED STATES *ats.* WILLIAM CLARK. } No. 170.

And for a further plea in this behalf, the said defendants, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said claimant ought not to have or maintain his aforesaid action thereof against them, because they say that heretofore, to wit, on the 30th day of June, in the year eighteen hundred and forty-six, the said claimant entered into a certain agreement with the said defendants, through the then navy agent at Memphis, for the construction of a certain embankment, to be made of clay, sand, gravel, or other good material, at the navy yard, Memphis, Tennessee, in such manner and places as shall be directed by the engineer or other authorized agent for and in behalf of these defendants; and that said contract afterwards—that is to say, on the 19th day of April, eighteen hundred and forty-eight—was assigned and set over to a certain Daniel Saffarans, and abandoned by said claimant, the work and labor upon said embankment were, after due notice of proposals therefor, assumed and undertaken by certain contractors using the style and firm of Saffa-

rans & Son, at the price of thirty-five cents per cubic yard for each and every cubic yard to be contained in said embankment, in lieu of the eighteen cents for each and every cubic yard therein, as specified in the contract first made with said claimant for the construction of said embankment so as aforesaid sold out and abandoned by said claimant; and they further say that the said claimant, before and at the time of the commencement of this suit, was and still is indebted to the said defendants in a large sum of money, to wit, the sum of five thousand six hundred and thirty-two $\frac{6}{100}$ dollars lawful money of the United States, for seventeen cents per cubic yard on thirty-two thousand eight hundred and fifty-seven $\frac{1}{7}$ cubic yards of said embankment at said navy yard, supplied to and for said defendants at the price of thirty-five cents per cubic yard, (instead of the eighteen cents, at which said claimant agreed to construct the
7 same,) by a certain Daniel Saffarans and a certain Isaac Saffarans, under the style and firm of Saffarans & Son, in pursuance of a certain contract with them made on the 23d day of December, eighteen hundred and forty-eight, after default made by said claimant in the performance of his agreement aforesaid; and which said sum of money so due and owing from said claimant to said defendant, exceeds the damages sustained by said claimant on occasion of the said supposed breach of any agreement in said petition alleged; and out of which sum of money so due and owing from said claimant, the said defendants are ready and willing, and hereby offer, to set off and allow to said claimant so much as will be sufficient to satisfy the damages sustained by him on occasion of the said supposed breach of any covenants or agreements on their part, to be performed, as aforesaid, according to the form of the statute in such case made and provided; and this the defendants are ready to verify; wherefore, they pray judgment if the said claimant ought to have or maintain the aforesaid action thereof against them, and also they pray judgment for the balance due from the said claimant to them, the said defendants.

JOHN B. KERR, *Deputy Solicitor.*

Court of Claims.

Replication to plea of set-off.

WILLIAM CLARK
vs.
THE UNITED STATES.

And the said plaintiff as to the said plea of the said defendants by them above pleaded, saith that the said plaintiff, by reason of any thing by the said defendants in that plea alleged, ought not to be barred from having and maintaining his action aforesaid, because he saith he is not indebted to said defendants as in said plea is alleged, because said plaintiff alleges that he fully performed all the obligations which he undertook to perform under and by virtue of said contract—in said plea set forth—and this he the said plaintiff is ready to verify—wherefore he prays judgment of the said court in his behalf for the sum alleged to be due him herein.

J. M. McCALLA, *Counsel for Clark.*

8 In the Court of Claims.

WILLIAM CLARK
vs.
THE UNITED STATES.

And now, to wit, 22d of January, 1866, the court, upon due consideration of the premises, do order, adjudge, and decree that the said claimant take nothing by his suit, and that said petition be dismissed.

By the court.

9 The United States Court of Claims.

On motion for appeal.

WILLIAM CLARK
vs.
UNITED STATES. No. 1,985.

Your petitioner William Clark, humbly complaining, shows unto your honors that on the 22d of January, 1866, in the above entitled and numbered cause, this court rendered judgment against your petitioner, by which judgment your petitioner is greatly injured and aggrieved, which judgment still remains in force.

Your petitioner avers, that this court erred in their judgment in said cause, and he prays your honors will allow him to appeal the same to the Supreme Court of the United States, so that the several errors of this court of which your petitioner complains and by which he has been injured, may be corrected by said Supreme Court, which errors are as follow:

1. The claimant to maintain the issue on his part, gave evidence tending to prove each and every of the allegations of his said petition, and the same was admitted without objection on the part of the United States. And thereupon the court ruled that, notwithstanding the facts so offered to be proved, the claimant was entitled to recover, because, by the contract he was bound to make and complete an embankment containing 221,000 cubic yards, and to deliver the same on the completion of the work, and that the embankment made and measured from time to time, and on account of which ninety per cent. of the contract price thereof was paid, remained at the risk of the claimant until the completion of the whole 221,000 cubic yards. And that although the aggregate of the quantities of embankment made from time to time in the successive periods between the several measurements, and remaining when the several measurements were made, might be proved to amount to 221,000 cubic yards, yet, nevertheless, the claimant on final settlement was entitled to credit for only the quantity remaining at the last measurement of the work.

10 2. And the claimant, to maintain the issue on his part joined, and to prove the quantity of embankment made, offered in evidence affidavits of Morrison, Todd, Maher 1st, Maher 2d, Liston and Seal, which had been taken before the establishment of the Court of Claims in the usual manner of taking testimony in relation to claims

against the United States, when there was no other mode of taking testimony, and were duly presented to the department and to Congress, and the witnesses are since dead or cannot be found after diligent inquiry; and the said depositions were read without objection at the trial—yet the court refused to consider the same as evidence in the cause.

3. And the claimant, further to maintain the issue on his part joined, offered in evidence official letters to the claimant, dated April 8th and April 10th, 1848, from Warford and Morrison respectively, officers of the United States engaged in superintending the work, to show the quantity of embankment made, and the reason why an error might be made in computing it, because of the mode adopted by said Warford, which rendered an accurate measurement impossible, and the court ruled that the same should be excluded from the evidence.

4. And the claimant, further to maintain the issue on his part joined, offered evidence to show that he had made embankment subsequent to the 15th day of July, 1847, and up to the 31st day of March, 1848, and the court ruled that the claimant was not entitled to compensation for such work done after said 15th July, 1847.

5. And the claimant, further to maintain the issue on his part joined, offered evidence, to wit: the affidavit of Morrison, made on the 6th day of March, 1862, and the letter of Jos. S. Watkins, dated the 6th day of March, 1849, and his certificate dated 23d of April, 1849, they having been respectively assistant engineer and navy agent at Memphis, to show that the cotemporaneous construction of the contract, was as contended for by the claimant; and the same were read without objection, and the court ruled that said deposition, letter, and certificate should not be considered, and refused to consider the same as evidence in this case.

And the claimant assigns for error each and every of said rulings, and the final judgment in the cause.

Whereof your petitioner asks, that he may have his appeal herein as above prayed for, and that the said several errors may be corrected, and as in duty bound he will ever pray, &c.

WILLIAM CLARK.
J. M. McCALLA, *Counsel for Clark.*

11 Modifications and alterations of the foregoing petition for the allowance of an appeal as certified by the court.

U. S. Court of Claims.

WILLIAM CLARK
vs.
THE UNITED STATES.

The claimant's amended petition of appeal in this case not having correctly and accurately stated the errors alleged to have been committed by the Court of Claims in the judgment rendered upon the pleadings and evidence as required by the rule of the Supreme Court in such case made and provided, the specifications of error are altered and amended as hereinafter set forth, to wit:

12 And first the court find and determine as matters of fact:

1. That the claimant made and entered into the agreement for building 221,000 yards of embankment in the navy yard at Memphis, Tenn., set forth in the petition in this action, and that he built under such contract 128,913 $\frac{55}{100}$ yards of said embankment, for which he has been fully paid by the defendants.

2. That the system of measurements pursued by the officers of the United States and by which the said quantity of 128,913 $\frac{55}{100}$ yards is computed, consisted in measuring from a fixed base monthly, and that the claimant at the time duly objected to such system of measurement and claimed that he should be paid for the quantity of earth actually deposited by him on said embankment.

13 3. That there was a waste and shrinkage of the embankment while building, and a natural settling of the batture on which the embankment was built, and that the loss occasioned thereby necessarily was borne by the claimant under the system of measurements adopted.

4. That the said system of measurements was the one customarily used on the public works of the government, and that there was no competent evidence offered by the claimant to show a contrary custom.

5. That the officers of the government interfered with the claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct currents of the river, and that they also used the embankment as a roadway, to the loss and

13½ injury of the claimant, but that all of such acts of which there was sufficient evidence, occurred subsequent to the 15 day of July, 1847, and when the claimant was in default in not having performed his said agreement and completed the said embankment.

14 And the court further decides as matters of law—

1. That the affidavits of Morrison, Todd, Maher 1st, Maher 2d, Liston and Seal, offered in evidence by the claimant upon the trial herein, being affidavits taken ex-parte by the claimant, for the purpose of presenting and sustaining his said claim before Congress, are not sufficient or competent evidence, and are not admissible in this action, and the court therefore excludes the same.

2. That the letters and communications from the commandant and engineer officers of the Memphis navy yard, offered in evidence by the claimant upon the trial herein, and written subsequent to the performance of the work by the claimant, and relating to the controversy between him and the defendants, are irrelevant and incompetent as evidence, and therefore excludes the same.

15 3. That the contract aforesaid was entire and not severable, and that by the terms thereof the claimant could only recover for the embankment completed and not for the quantity of earth deposited by him therein, and that as a necessary and legal consequence thereof all loss by settling, shrinkage, and the action of the currents of the river was to be borne by the claimant and not by the United States.

4. That the claimant was not entitled to recover for the interference of the defendants or their officers subsequent to the 15 July, 1847, the time when the work under his said contract was to have been completed by the terms of his agreement.

16 In the Court of Claims.

WILLIAM CLARK
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing is a true transcript of the pleadings in the above-entitled case, and of the final judgment of the court thereon; and of the petition of the claimant for the allowance of an appeal, with the alterations and modifications of the points decided and alleged for error as certified by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 6th day of July, A. D. 1866.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Attest: JOS. CASEY,
Ch. J. Ct. of Cl.

At a Court of Claims held at the Capitol in the city of Washington, on Wednesday, the 25th day of April, A. D. 1866.

WILLIAM CLARK
vs.
THE UNITED STATES.

The above-entitled case is submitted on petition of appeal to the Supreme Court of the United States.

At a Court of Claims held at the Capitol, in the city of Washington, on Thursday, the 21st day of June, A. D. 1866.

WILLIAM CLARK
vs.
THE UNITED STATES.

Ordered, that the appeal in the above-entitled case be allowed, and that it be certified with such alterations and modifications of the petition for the same as filed by the court.

A true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 17th day of October, A. D. 1866.

[SEAL.]

SAM'L H. HUNTINGTON,
Ch. Clerk Court of Claims.

Attest:

JOS. CASEY, *Ch. J.*

Filed 24 October, 1866.